PUBLIC PROSECUTOR

v.

TAN KOON SWAN

HIGH COURT, SINGAPORE
LAI KEW CHAI J
[CRIMINAL CASE NO. 25 OF 1986]
26 AUGUST 1986

CRIMINAL LAW AND PROCEDURE: *Criminal breach of trust - Abetment - Accused pleaded guilty - Sentence - Fine in lieu of custodial sentence - Considerations relevant in imposing a sentence - Restitution by accused - Public interest - Protection of commercial market.*

The accused, Tan Koon Swan, pleaded guilty to a charge of abetting one Tan Kok Liang, a director of Pan-Electric Industries Ltd. (the company) in committing a criminal breach of trust by conspiring with the said Tan Kok Liang to dishonestly dispose of property belonging to the company, namely the company's funds in the sum of S$144,852.68 for the acquisition of Grand United Holdings Bhd. securities by Orchard Hotel (S) Pte. Ltd., a subsidiary of the company. The punishment prescribed by law is imprisonment for a term which may extend to three years or a fine or both.

Held:

[1] Although the accused has made partial restitution, the losses caused to shareholders have become irreparable.

[2] The accused had committed the offence of abetting a director of a public and listed company in the dishonest misappropriation of the company's funds and in violation of the director's duties under the Companies Act.

[3] As between the director and the accused the accused was more culpable. The offence committed by the accused cannot be viewed in isolation; nor was it unpremeditated. In fact, the offence of abetment committed by the accused in the circumstances struck at the very heart of the integrity, reputation and confidence of Singapore as a commercial city and a financial centre.

[4] Public interest plainly requires that the accused should receive a punishment which will not only fit his crime but which will also act as a deterrent to other persons who may be similarly disposed.

[5] The accused was sentenced to 2 years' imprisonment and fined S$500,000, in default a further 6 months' imprisonment.

[Accused convicted.]

Legislation referred to:
Criminal Procedure Code [Sing], ss. 177(1), 223(a)
Companies Act [Sing], s. 157(1)
Penal Code [Sing], ss. 109, 406, 407

For the accused - Peter Yap
For the bailors - Ng Kong Yeam
For the public prosecutor - Glenn Knight with Eleanor Wong

JUDGMENT

Lai Kew Chai J:

The accused pleaded guilty to a charge of abetting one Tan Kok Liang in committing a criminal breach of trust which offence is punishable under s. 109 read with s. 406 of the Penal Code. The punishment prescribed by law is imprisonment for a term which may extend to three years, or a fine, or both. Under s. 406 no sum is expressed to which the fine may extend. Accordingly, under s. 223(a) of the Criminal Procedure Code ("the CPC") the amount of the fine is "unlimited but shall not be excessive".

The charge reads as follows:

> You, Tan Koon Swan are charged that you on or about 11 September 1985 in Singapore abetted one Tan Kok Liang, a director of Pan-Electric Industries Ltd. (the company) in the commission of the offence of criminal breach of trust in that you engaged with him in a conspiracy to dishonestly dispose of property belonging to the company, namely its funds, over which he had dominion and which he did so dispose of in violation of s. 157(1) of the Companies Act (1985 Reprint) a direction of law which prescribed that he was to dispose of such property honestly which he did not, and this he did when he authorised or arranged for the company to pay a sum of S$144,852.68 comprised in CB Cheque No. 750813 belonging to the company for the acquisition of Grand United Holdings Bhd. securities by Orchard Hotel (S) Pte. Ltd., a subsidiary of the company, which act was committed in consequence of your abetment, and thereby committed an offence punishable under s. 109 read with s. 406 of the Penal Code (Cap. 103).

According to the statement of facts, which was admitted by the accused, the accused had played a significant and central part in forward contracts and the financing thereof which brought about the demise of the Pan-Electric group. He, in effect, admitted that he had conspired with Tan Kok Liang and had made use of the resources of the group. It is also clear that, as a necessary part of the conspiracy, the accused had engaged in price support schemes so that forward contracts could be extended or rolled-over and could be financed by the banking system. It was in connection with one such support scheme that the dishonest misappropriation was committed by Tan Kok Liang to pay the accrued interest charges to a firm of stock-brokers.

In the context of considering what has been set out in the statement of facts and what has been admitted by the accused, the following matters must be noted:

(a) the accused has pleaded guilty to and has been convicted of the offence of abetment of a particular breach of trust;

(b) the prescribed punishment for the offence is imprisonment for a term which may extend to three years, or a fine, or both such imprisonment and fine;

(c) the offence in this case relates only to a relatively minor aspect of what is, as revealed by the statement of facts, a much wider and rather more complicated mosaic of facts, including alleged criminal wrong-doings, in respect of which there have been no convictions;

(d) the accused has not been convicted of any other offence arising out of or in connection with the facts and circumstances referred to in the statement of facts; and

(e) in considering the sentence in this case no other charges are taken into account with the consent of the accused under s. 177(1) of the CPC.

Accordingly, it has to be noted in all circumstances of the case that the only sentence which this Court can mete out is a sentence for the offence for which the accused has been convicted before it. Looking at the offence, the accused had engaged with one Tan Kok Liang in a conspiracy to dishonestly dispose of the sum of S$144,852.68 of Pan-Electric Industries Limited (hereinafter referred to as "Pan-El"). As a result of the conspiracy Tan Kok Liang violated s. 157(1) of the Companies Act and dishonestly paid out the money of the company to a firm of stock-brokers. He was aided and abetted by the accused.

So far as the commercial matrix in which the offence was committed is concerned, this may be stated within a reasonably short compass. In November 1984 the accused held or had contracted to take delivery of a total of 34 million shares in Grand United Holdings Berhad (hereinafter referred to as "GUH"), a publicly listed company in which the accused was the substantial shareholder. He had to complete and pay for a block of such shares by 19 November 1984. Having failed to arrange the necessary financing because, as he claimed, he was deeply involved in a crisis which had embroiled his political party, Malaysian Chinese Association, he sought "expedient help". Through two friends, he was introduced to one Peter Tham who, in addition to being the managing director of a stockbroking firm known as Associated Asian Securities Limited (hereinafter referred to as "AAS"), was a substantial shareholder of Pan-El and Growth Industrial Holdings Limited (hereinafter referred to as "GIH") which were at all material times also publicly listed companies. They met on or about 14 November 1984. What had been agreed between the accused and Peter Tham as a result of that meeting and what had transpired thereafter no doubt prompted Counsel for the accused to describe it as a "fatal meeting".

As a result of that meeting, Peter Tham agreed to buy from the accused the 34 million GUH shares at $1.75 per share or at the total cost of $59.5 million. It has to be emphasised that on 13 November 1984 GUH shares were transacted in the market at about $1.34 per share. If Peter Tham had entered into the transaction on his own account he would have suffered the colossal loss of some $13.9 million.

Peter Tham instead decided to make use of the resources of Pan-El and GIH, the two publicly listed companies at his disposal, to purchase the 34 million GUH shares from the accused. Peter Tham also used AAS to put through the transactions. As the sums involved were "staggering", and they could have pushed the Pan-E1 group to the brink, Peter Tham arranged to fund the purchases by the use of a "roll-over" mechanism. By this mechanism, arrangements were made with an agent or a stockbroker who would use his or their financial resources, obtained through his or their own borrowings from the banking system, to purchase the same shares from the Pan-E1 and GIH groups. Simultaneously, the groups would contract to re-purchase the same shares but in order to provide for the roll-over period delivery thereunder and payments therefor (inclusive of the rather high funding charges) were agreed to take place 6 months later. During the roll-over period the shares would remain as security with the broker or financial institution funding the arrangement.

The sale or "roll-over" had to be done at just below the market price while the re-purchase price would be calculated by adding to the sale price the funding charges, which were way above market rates, and other charges.

Since the market price of GUH shares was substantially lower than the agreed price of $1.75 per share, Peter Tham had to artificially raise the price of GUH shares. He did this by using a wholly-owned subsidiary of GIH which bought from the open market 2.8 million GUH shares. In that way he artificially enhanced the price per share from $1.34 on 13 November 1984 to $1.70 on 19 November 1984 which was the day the Pan-E1 and GIH groups had to take delivery of the 34 million GUH shares from the accused.

By 7 December 1984 the accused received $59.5 million for his 34 million GUH shares from the Pan-E1 and GIH group of companies. On that day the GUH shares dropped to $1.50 per share in the absence of price support purchases by Peter Tham. The potential loss to the Pan-E1 and GIH group of companies was in the region of $20 million.

At the same fateful meeting with Peter Tham, the accused had also agreed to buy Pan-E1 shares from Peter Tham. The accused claimed in mitigation that he had reluctantly agreed to do so and that other shares were unlawfully passed on to him by Peter Tham. By December 1984 the accused had purchased approximately 24 million Pan-E1 shares and 9.8 million GIH shares. The 24 million Pan-E1 shares gave the accused 15% control of Pan-E1. The 9.8 million GIH shares gave him 16% control of GIH, which made him one of the largest single shareholders of GIH. With GIH's 31% control of Pan-E1 and the 15% Pan-E1 control through his personal shareholdings the accused in truth and in fact wielded substantial control of Pan-E1.

In March 1985 Sigma International Ltd. ("Sigma"), another publicly listed company in the control of the accused and of which the accused was the chairman, announced its intention to purchase the 24 million Pan-E1 shares from the accused and an additional 10 or 11 million shares from the associates of the accused. The consideration for these shares was by way of the issue of 2 new Sigma shares for each Pan-E1 share. After this share exchange Sigma secured 22% control of Pan-E1. Together with GIH's 16% control of Pan-E1, the accused consolidated his control of Pan-E1.

At all material times one Tan Kok Liang was a director of Pan-E1 and of several of its subsidiaries including Orchard Hotel (S) Pte. Limited and Orange Grove Property Pte. Ltd. (hereinafter referred to as "Orange Grove"). Pan-E1 is now in the hands of provisional liquidators. Tan Kok Liang was also a director of GIH which held a 31% stake in Pan-E1. He and Peter Tham at all material times were the only 2 members of the investment committees of Pan-E1 and GIH with full powers to invest on behalf of the two groups.

I now turn to May 1985 after the accused had consolidated his control over Pan-E1. Under those circumstances, the accused could and did give instructions to Tan Kok Liang. It is now appropriate to turn to the proximately more direct circumstances which involved the dealing of GUH shares and under which the offence was committed by the accused. They are succinctly set out in the last four paragraphs of the statement of facts which the accused had accepted as correct. I now reproduce them:

> 22 Before May 1985, just before the 27.775 million GUH shares were due for delivery from Ballas, E.G. Tan and Capel through AAS, Tan Kok Liang was concerned about how he was to effect payment. He discovered from AAS that the accused was the owner of the shares and the person who had landed the Pan-E1 group with the shares. The accused told Tan Kok Liang that if necessary he was to arrange to roll over as much as he could with the group's available finances.
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> 23 On 10 May 1985 the closing market price for Grand United Holding (GUH) shares was only $1.35. This would have made it difficult if not impossible for Orange Grove to "roll-over" the GUH shares that were due to be delivered to and paid for by Orange Grove. On the request of the accused, Tan Kok Liang went into the market and purchased 9.8 m GUH shares, which the Pan-E1 group did not need, to artificially create a price which would facilitate the roll over. From 10 May 85 to 16 May 85 (when 21.8 m GUH shares were rolled over) the price rose to $1.56.

24 Out of the 9.8 m GUH shares purchased in order to create the artificial price support, 3 m were purchased by Orchard Hotel (a subsidiary of Pan E1) through Lin Securities Pte., another stockbroking company. For this $4,778,895 was paid.

25 On 11 Sept 1985 Tan Kok Liang conspiring with the accused instructed or arranged for Pan E1 to pay $144,852.68 representing interest charges to Lin Securities Ltd. This money, which Tan Kok Liang as the Director had dominion over, was the property of Pan E1. The accused engaged with Tan Kok Liang in this conspiracy to dishonestly dispose of this money belonging to Pan E1. The sum was paid vide cheque CB no. 750813 belonging to Pan E1 for the acquisition of GUH securities by Orchard Hotel, a subsidiary of Pan E1. This was clearly a breach of Tan Kok Liang's duty to Pan E1 and a violation of s. 157(1) of the Companies Act (1985 Reprint) which prescribed that Tan Kok Liang was to dispose of such property honestly. The payment of this sum was clearly made in consequence of the abetment by the accused. It was made not for Tan Kok Liang's own benefit but for the accused's benefit.

In mitigation learned Counsel for the accused traced the latter's personal and political background. He is very much a self-made man. It was submitted that in late 1984 the accused had to meet a wide range of commercial and political responsibilities and that the offence was committed under extenuating circumstances in which he was the largest single loser in the "bizarre affair".

Learned Counsel for the accused strongly urged this Court not to impose a custodial sentence as he had made partial restitution and had suffered enough. It was urged that instead of imposing a custodial sentence I should order instead a fine "of a very substantial amount consistent with the gravity of the offence".

So far as partial restitution is concerned, it was submitted that shortly after the accused was arrested and charged he had made representations through Counsel to the prosecution. It was stressed that in line with such representations the accused had made further arrangements to solve the problems with 5 stockbroking firms in Singapore which had previously transacted with Pan-E1 on GUH and other shares. The accused had, through financially guaranteed arrangements, agreed to purchase from three stock-broking firms shares in GUH and another publicly listed company at the cost of nearly $14 million. It is also claimed that the accused is committed to similar arrangements with two more stockbrokers. The liability of the accused, if and when enforced, could expose him to the tune of S$53 million.

In addition, the accused has made the further restitution of $34 million.

The following additional reasons were also canvassed on behalf of the accused in an attempt to persuade me to impose a substantial fine in lieu of a custodial sentence:

(a) The accused has pleaded guilty and has shown great remorse for what he did. It also saves the Court time and costs in unravelling a highly complex set of transactions.

(b) The accused is a first offender and a man of good character.

(c) There is no possibility of such an offence occurring again since the lessons learnt have been most painful to him.

(d) The accused has already been severely punished by his huge financial losses and the trauma of awaiting trial.

(e) The accused is member of Parliament for Gopeng having been elected on 3 August 1986. He desperately needs to return and serve his constituency and his country.

(f) The accused is the President of the Malaysian Chinese Association, the 2nd largest component party in the ruling Barisan Nasional, (and) his services as the President of MCA are urgently required by the 400,000 members particularly at this time

(g) The agreement on the forward contracts which he signed with the brokers demand his credibility to revitalise the operations of Grand United and Supreme Corporation. A custodial sentence will destroy that credibility and the accused will be at a total loss to pursue his commitment to honour this obligation to the stockbrokers in Singapore.

The learned Deputy Public Prosecutor pointed out that having taken everything into account the prosecution decided to proceed on the one charge to which the accused has pleaded guilty. To get the accused to make as much restitution as possible, the prosecution undertook not to press for a punitive sentence. However, the learned Deputy Public Prosecutor made it plain that the matter of sentence is and always has been left to the Court and that in the administration of justice in Singapore there is no room whatsoever for any plea bargaining on sentence.

Although the accused has made the partial restitution I have referred to, it has to be noted, as the learned Deputy Public Prosecutor observed, that the losses caused to shareholders have become irreparable. Pan-E1 is now in provisional liquidation. Many others have suffered.

I must now pronounce the appropriate sentence. I remind myself of the principle that the only sentence this Court can mete out is a sentence for the offence for which the accused has been convicted. The accused had committed the offence of abetting a director of a public and listed company in the dishonest misappropriation of the money of the company and in violation of the director's duties under the Companies Act. As between the director and the accused, it was plain that the accused was far more culpable. It was also not an offence that could be viewed in isolation; nor was it unpremeditated. The dishonest misappropriation was carried out as a part of the conspiracy to "artificially create a price which would facilitate the roll over" and the financing of the shares in GUH, another public and listed company. The offence of abetment committed by the accused in these circumstances struck at the very heart of the integrity, reputation and confidence of Singapore as a commercial city and a financial centre. I cannot ignore the aftermath of the collapse of the Pan-E1 group. In my judgment public interest plainly requires that the accused should receive a punishment which will not only fit his crime but which will also act as a deterrent to other persons who may be similarly disposed. Our commercial market place must be protected from and purged of the likes of the accused. I have carefully considered every submission made on his behalf. In my judgment the appropriate sentence is imprisonment for a term of 2 years and a fine of $500,000 in default of which there will be imprisonment for a further term of 6 months.

Also found at [1986] 2 CLJ 379